No. 75-244

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES BRAVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the court of appeals erroneously applied a test of "reasonable foreseeability" of criminal involvement by bank officials in upholding his conviction of conspiring to misapply bank funds, and that the trial court erred in not giving a multiple conspiracy instruction.

After trial in the United States District Court for the Northern District of Illinois, petitioner was found guilty by a jury of conspiring, in violation of

18 U.S.C. 371, to violate 18 U.S.C. 656 (willful misapplication of bank funds), and of five related substantive offenses. The court, however, granted petitioner's motion for acquittal of the substantive counts, except for count 6, submission of a false statement to a bank to influence its actions, in violation of 18 U.S.C. 1014. Petitioner was fined $1,000 each on the conspiracy count and the substantive count. The court of appeals affirmed (Pet. App. A, pp. 3-12).

The evidence at trial showed that petitioner, his friend Robert Ness, and two officers of a Chicago bank, Stanley Johnson and Charles Helm, participated in a scheme to procure bank funds for Ness in violation of authorized bank procedures.[1] Petitioner was a broker on the Chicago Merchantile Exchange. Ness, who was engaged in commodities trading and was insolvent, asked petitioner for a loan, explaining that he needed $15,000 to $20,000. When petitioner was unable to comply, Ness suggested that petitioner could obtain a bank loan for Ness using a fictitious name (Tr. 108). In response to petitioner's inquiry how such a loan could be arranged, Ness replied that he "could handle such a situation at the Steel City National Bank" (Tr. 108, 403). Ness noted that if a loan was taken in a false name, a reliable mail drop would be required to insure that correspondence from the bank would not be returned (Tr. 109). Petitioner agreed to "think about" the matter, pointing out that

[1] Ness, Johnson and Helm pleaded guilty before trial to charges in other indictments and were not tried with petitioner.

in any case he "would need time to locate a friend who could receive the mail" (Tr. 109, 403). Ness left a blank promissory note from the Steel City Bank with petitioner, adding, "I'll see what I can do, whether I can arrange it, and we'll go from there" (Tr. 109).

Shortly thereafter, petitioner returned the note to Ness bearing the signature "Peter Weis" and the address of a model home owned by a friend (Tr. 110, 114). Although petitioner had signed a blank note and had not filled out a financial statement in regard to the loan, Ness told him that he could expect approval of the loan in a day (Tr. 124). Later petitioner and Ness did "get together" to prepare a financial statement; petitioner simply signing the blank statement with the fictitious name and leaving it to Ness to fill in the financial data (Tr. 128). After Ness received a $30,000 loan from the bank, he backdated the financial statement by about three weeks and submitted it to the bank.[2] When the note came due, Ness renewed it with one of several renewal notes signed by petitioner as "Peter Weis" (Tr. 149).

At about the same time, co-defendant Johnson advised Ness that bank correspondence sent to the false

[2] Ness gave the statement to co-defendant Helm and advised co-defendant Johnson that a loan file could now be compiled since Helm had the financial statement. Johnson told Ness that a memorandum stating the purpose of the loan would be needed for the file, since bank examiners were then in the bank. At Ness's suggestion, he listed as the purpose the purchase of real estate and entered false data concerning the identity of the non-existent seller (Tr. 140-143, Govt. Ex. 17).

address was being returned to the bank. Petitioner then arranged for a second false address, that of his nephew, and instructed the nephew to throw out any mail received from the Steel City Bank (Tr. 14-15).

Later, petitioner agreed to handle the commodities trading account of certain friends of Ness. During the next month, trading in the account generated commissions of more than $3,500 for petitioner, until a deficit position in the account forced a halt to the trading. Petitioner initially declined Ness's request for help in obtaining a second loan to eliminate the deficit, but Ness eventually obtained a loan of $20,000, with petitioner's knowledge, using a note previously signed by petitioner in the name of Weis (Tr. 160-163). By means of this loan, trading was resumed in the account, and the account generated additional commissions of more than $5,500 to petitioner during the next two months (Tr. 586). Near the end of this period, Ness completed and submitted to the bank another financial statement that petitioner had signed in blank using the fictitious name (Tr. 169-170).

1. Petitioner contends (Pet. 10-14) that the court of appeals erroneously affirmed his conviction by finding that it was reasonably foreseeable that bank officials, and not just Ness, would participate in the conspiracy to misapply bank funds. Petitioner argues that unless his knowledge of participation by bank officials is proved, his participation in the conspiracy to misapply bank funds has not been proved, and that the standard of proof required by this Court in con-

spiracy cases is that the evidence be "clear, not equivocal," citing *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.

The agreement that is the essential element of a conspiracy need not be shown to have been explicit, but can be inferred from the facts and circumstances of the case. *Id.* at 711-713; *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10. Moreover, while the accused must be shown to have known "the essential nature of the plan," he need not have been aware of all its details or the participation of specific other persons. *Blumenthal* v. *United States*, 332 U.S. 539, 557. In the instant case, as the court of appeals found, the evidence negates any reasonable belief by petitioner that the scheme involved only himself and Ness, that is, that it consisted of Ness's "so doctor[ing] the papers supporting this loan * * * that the loan officers would be fooled * * *" (Pet. App. A, p. 9). To the contrary, as the court of appeals concluded (*ibid.*):

> The handling of the transactions was so bizarre, the concealment of the truth was so evident, and the badges of fraud were so obvious that we are unable to preclude the drawing of a reasonable inference that [petitioner] was not ignorant of the *necessity* of bank inside complicity. He need not have foreseen the exact form of that complicity nor the identity of those involved. [Emphasis added.]

Thus the court of appeals determined that the evidence that petitioner knew of the involvement of the bank officials was in fact "clear, not equivocal." Peti-

tioner's claim that the court applied an incorrect standard is therefore without merit.

2. Petitioner contends (Pet. 14-16) that under an instruction given the jury (Pet. App. C, p. 19) he could have been convicted of the conspiracy charged even if the jury found that he had conspired only with Ness to submit false statements to the bank and that no bank officials were involved. Therefore, as we understand petitioner's argument, he claims that he was entitled to an instruction that, if the jury found that a conspiracy of only this scope existed, it could consider only those acts and statements of co-conspirators that were in furtherance of this narrower conspiracy—*i.e.*, only statements of Ness and not those of the bank officials.

Although the court did instruct the jury that to convict petitioner it must find a conspiracy to commit "any one of" the three substantive offenses listed as objects of the conspiracy (*ibid.*), it is inaccurate to suggest that the jury was thereby permitted to convict petitioner "on a finding that [he] and Ness conspired [without the knowledge of bank officials] to submit false statements to influence the bank" (Pet. 15). The indictment charged a conspiracy between petitioner, Ness, *and* bank officials, and the instructions specifically referred to the conspiracy "as charged in the indictment" (Pet. App. C, p. 22). Moreover, as the court of appeals found, the evidence was inescapable that if petitioner was part of any conspiracy, it was one that contemplated the knowing assistance of bank officials.

But even if the court's instruction permitted the jury to convict petitioner of conspiring merely with Ness to submit false statements (a conspiracy with that objective would not require bank officer participation), petitioner was not prejudiced, for the court's further instructions adequately limited the jury's application of the "conspirator attribution rules" (Pet. 14) according to the scope of the scheme the jury found to have existed. After stating that to convict petitioner the government had to prove beyond a reasonable doubt both a conspiracy to commit "any one of these [underlying] offenses" (Pet. App. C, p. 19) and that petitioner "was aware of the common purpose and was a willing participant with the intent to advance the purpose of the conspiracy" (Pet. App. C, p. 21), the court continued (*ibid.*):

> If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then the acts and declarations of any other member of such a conspiracy in or out of the defendant's presence done in furtherance of the objectives of the conspiracy and during its existence may be considered as evidence against such defendant.

On the other hand, the court noted, "statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making those statements" (*ibid.*). Thus the jury was effectively instructed to define the scope of the conspiracy, if any, and to consider only

those co-conspirator statements that were in furtherance of the objectives of the conspiracy.

Finally, if one accepts the supposition that the jury may have convicted petitioner solely of the narrow false statements conspiracy with Ness alone, it is hard to see how statements of the bank officers would have had any relevance to the question of petitioner's involvement in that conspiracy—the evidence for which was overwhelming. Petitioner has not indicated how any such declarations may have affected the jury's verdict in this respect, and thus any error would have been harmless.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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